

## Environmental Law Update

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In *Neville v. Koch*, 56, New York City proposed to rezone a full city block in the Times Square area from medium-density manufacturing to high-density commercial and residential. At the time of the rezoning, no actual projects had been proposed yet for the site, and SEQRA review was premised on hypothetical uses.

Seven area residents challenged the rezoning. They argued that approval should have been subject to further review based on later, specific projects.

The high court agreed with the appellate division that it was proper to study hypothetical projects designated as the reasonable "full-build" uses for the site — a range of worst-case hypotheticals that reasonably could be anticipated to be built there.

### EPA Use of Unfiltered Sample Is Found to Be Arbitrary

THE ACTION of the Environmental Protection Agency in basing the waste characteristics score of a landfill on a single, unfiltered ground water sample

was arbitrary and capricious, the U.S. Circuit Court for the District of Columbia held May 1.

In *Kent County v. Environmental Protection Agency*, 90-1569, the EPA proposed placing a landfill in Kent County (Del.) on the National Priorities List after data from tests indicated the presence of arsenic, chromium, manganese and organic compounds in a monitoring well at the site. Kent County challenged the decision, arguing that the EPA had improperly based its measurement of the site's waste characteristics solely on an unfiltered groundwater sample.

Despite comments questioning the accuracy of the agency's groundwater tests, the EPA chose not to retest the site using filtered samples. The agency contended that such testing was not a regulatory requirement.

The court noted that the one authority relied on by the agency to support its argument was equivocal, and that the agency never had asserted that performing tests on both unfiltered

and filtered samples would be too  
dense.

### Failure to Disclose Letter Denies Owner Fair Hearing

THE FAILURE of the North Dakota Department of Health and Consumer Laboratories to disclose a hearing officer's opposition to a landfill operator's application to dispose of incinerator waste deprived the owner of a hearing, the Supreme Court of North Dakota held March 31.

In *Municipal Services Corp. v. Dakota*, 910208, Municipal Services conditioned for permission to dispose of incinerator ash in a landfill its filing of a petition with the state health department. The state health department denied the petition, and Municipal Services requested a rehearing and the disclosure of the hearing officer's basis for the denial. The hearing officer had sent a letter to the governor. In the letter, he stated his firm opposition to permitting the landfill and said that his preference was to approach the public hearing with an announced intent to deny the petition.

Municipal Services claimed that the letter indicated a bias on the part of the hearing officer that denied it the right to a fair hearing. The department argued that the letter was only a statement of the hearing officer's opinion about law and policy. The court held that there was an inappropriate appearance of prejudgment and that the department's procedure did not afford Municipal Services a fair hearing.

### Denial of Permit Is Not A First Amendment Violation

A MEMBER of Puerto Rico's statehood New Progressive Party was a prominent critic of the environmental policies of the Popular Democratic Party, was not denied a disposal permit in retaliation for his political views, the 1st U.S. Circuit Court of Appeals held May 7.

In *Nestor Colon Medina & Sons Inc. v. Custodio*, 91-1469, Cerame, a prominent member of the New Progressive Party, alleged that he denied a waste disposal permit by the Puerto Rico Planning Board in retaliation for his outspoken criticism of the government's environmental policies.

The court first stated that the denial of a land use permit in retaliation for the applicant's political views is a First Amendment violation. Following Supreme Court's analysis in *Shelton v. United States*, 411 U.S. 659 (1973), however, the 1st Circuit held that Mr. Vivas had never alleged

#### CASE OF THE WEEK

### Utilities Barred From Intervening in EPA Suit

IN A CITIZEN suit to force the Environmental Protection Agency to review and revise the national ambient air quality standards for ozone, electric utilities could not intervene as defendants, the 2d U.S. Circuit Court of Appeals held May 4.

In *American Lung Association v. Reilly*, 92-6060, the plaintiffs filed suit alleging that the EPA had breached its non-discretionary, statutory duty to review and, if necessary, revise the national ambient air quality standards for ozone. The plaintiffs sought to compel the EPA to publish either proposed revisions to the standards or a decision formally declining to revise them, to provide the public with the opportunity for notice and comment and to promulgate final regulations.

Sixty-seven electric utilities moved to intervene as defendant parties. They

matter of the proceeding and their involvement too contingent on the occurrence of a series of events. In addition, the court ruled that the utilities could not demonstrate an interest in the rule-making schedule that would not be adequately represented by the EPA.

The utilities argued that their interest was in having an opportunity to help shape the schedule for the judicially compelled rule-making. They contended that they might have insufficient time to prepare a response to any proposal or to submit comments during the comment period.

The circuit court found the utilities' arguments inadequate to overcome the district court's discretionary denial of intervention. The court noted that the utilities had asked for little that was new or even particularly different from the defenses asserted by the

THURSDAY, DECEMBER 10, 1992

# EPA Is Drilling For Samples Of Industrial Contaminants

By Robert Goodrich  
Of the Post-Dispatch Staff

Drilling rigs are going up in Sauget, but they're not searching for Uncle Jed's Texas tea.

They're testing for poison.

An Illinois Environmental Protection Agency drilling crew pulled soil samples from as deep as 20 feet below the surface of Sauget Tuesday, checking for old industrial contaminants.

The site, near the village park on Ogden Avenue just north of Queeny Avenue, is one of 16 in the area being checked for pollution.

Millions of dollars are being spent to clean up some other sites, but J. Stanley Black, an analyst for the Illinois EPA, said no one knows whether this one, called "Site K," is polluted.

Agency officials suspect pollution because aerial photos from the early 1970s show the site was once a pond.

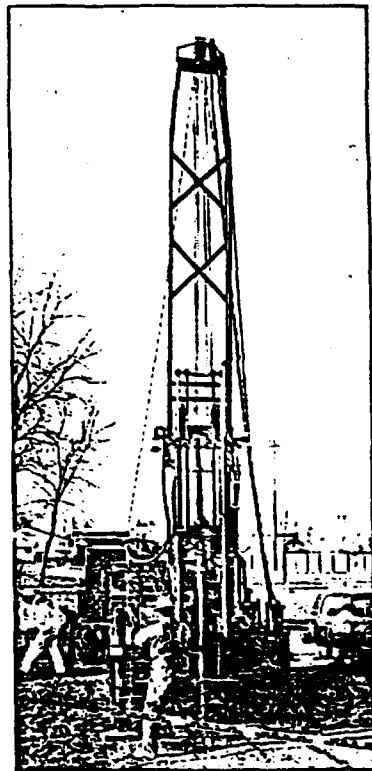
"We do know that the site was filled over a period of years," Black said. "Demolition debris may have been used as fill. If you've got a site in an industrial area, you never know what went in," he explained.

He passed out leaflets to neighboring residents to explain that the drilling and sampling were no cause for alarm or for avoiding the village park.

"The surface is not a matter of real concern," Black said. "We're looking deeper."

Mayor Paul Sauget dropped by as the crew punched a hole next to the park fence. In salty language, he declared the operation a waste of time and taxpayer's money.

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Scott Dine/Post-Dispatch

TOP: Illinois environmental technicians drilling for soil samples in Sauget. LEFT: Workers recording data. They are (left to right) Sheila Murphy, project manager, Sherry Oto, Kim Nika and Ken Corkill.

## Drilling

From page one

Unoffended, Black said he hoped that the mayor was correct in his belief that nothing harmful would be found. But he said it would be worth the cost of sampling to know that.

The drilling crew turned up nothing alarming in its first few drillings. The crew examined samples visually and with a hand-held monitor used to sniff for evidence of chemical solvents or petroleum products. More testing will be done in a laboratory, Black said.

Ground pollution would not necessarily mean there was illegal dumping or even carelessness, Black said.

For example, coal tar from old coal-

fired municipal utility plants was not considered a contaminant in the days when they were operating.

"Now, literally 100 years later, we're dealing with that legacy," Black said. Illinois is working to clean up 86 coal tar sites.

Polychlorinated biphenyls (PCBs) also were once thought harmless. Now, they are considered a likely cause of cancer.

Black said each of the 16 area sites being examined by the Illinois EPA would be worked on in stages.

Hazardous waste from local industries was dumped at a dozen sites on six segments of nearby Dead Creek,

beginning almost a century ago and continuing into the 1970s.

The Illinois EPA's primary concern is movement of contaminated ground water toward the Mississippi River. Contaminants include heavy metals, chlorobenzene, pesticides, PCBs and dioxins.

Two years ago, Cerro Copper

Products Co. agreed to spend \$12 million to remove about 25,000 cubic yards of contaminated soil from one segment of Dead Creek.

In March, Cerro Copper sued Monsanto Co. and one of its subsidiaries in U.S. District Court in East St. Louis for \$12.8 million.

**The site is one of 16 in the area being checked for pollution.**